LUM CHOON REALTY SDN BHD

v.

PERWIRA HABIB BANK MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-02-862-98]
30 MARCH 2000

LAND LAW: *Charge - Order for sale - Order for sale by Land Administrator - Validity - Land Administrator issuing Form 16H to inform parties of new auction date and new reserve price - Whether constituted a new order for sale - National Land Code, ss. 263, 418*

The respondent had applied for the sale of two parcels of land charged to it by the appellant. The Land Administrator then held an enquiry and on 6 October 1997 granted an order for sale under s. 263 National Land Code ('the Code') by issuing Form 16H thereof ('the first order'). The scheduled auction sale did not take place as the parties were engaged in negotiations for a settlement. No settlement was however reached upon, and that being so, the appellant applied to re-open the enquiry in order to set aside the first order. The application was rejected by the Land Administrator, who, instead, allowed the respondent's application for a new auction date and a new reserve price. And thus, on 8 June 1998, the Land Administrator again issued Form 16H ordering the land to be sold by public auction, and sold at a new reserve price ('the second order'). The appellant appealed against the second order. Before the Court of Appeal the appellant argued that the second order was defective upon the authority of *Eu Finance Berhad v. Lim Yoke Foo* and *Perwira Affin Bank Bhd v. Lim Weow,* as there was already a subsisting earlier order in the form of the first order.

Held:
Per Siti Norma Yaakob JCA

[1] The Land Administrator did not cancel the first order as was done in *Eu Finance.* And, unlike what was done in *Perwira Affin Bank,* the Land Administrator did not also accede to the appellant's request to re-open the enquiry and hold a fresh one.

[2] All that the Land Administrator did was to fix a new auction date and a new reserve price, matters that were well within his powers and jurisdiction, but unwittingly, he committed the error of notifying both parties of such matters through the issue of another Form 16H, whereas a letter would have sufficed to inform the parties of the new auction date and new reserve price.

[3] The use of a wrong form does not make it to be what it is, if an acceptable explanation is given as to the circumstances how the form was issued. In this instance, the Land Administrator did nothing to indicate that his first order was in any way invalid. What he did wrong, but which did not affect the validity of the first order, was to issue a second Form 16H to inform the parties of the new auction date and reserve price, when a letter would suffice.

[3a] Since in reality, the Land Administrator never made a second order for sale, the second order can never, on the face of Form 16H, be regarded as a second order for sale. The learned judge is right in finding that there cannot be read into the second order, any order for sale but that the second Form 16H merely informed the parties of the new auction date and reserve price.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah memohon untuk penjualan dua bidang tanah yang digadaikan kepadanya oleh perayu. Pentadbir Tanah kemudiannya telah mengadakan satu siasatan dan pada 6 Oktober 1997 telah memberikan satu perintah penjualan di bawah s. 263 Kanun Tanah Negara ('Kanun') dengan mengeluarkan Borang 16H ('perintah pertama'). Perlelongan yang dijadualkan tidak berlangsung kerana pihak-pihak tersebut sedang menjalankan perundingan untuk satu penyelesaian. Tiada penyelesaian namun begitu telah dicapai, dan dalam keadaan sedemikian, perayu memohon untuk membuka semula siasatan bagi mengenepikan perintah pertama tersebut. Permohonan itu telah ditolak oleh Pentadbir Tanah, yang sebaliknya telah mmbenarkan permohonan responden untuk satu tarikh perlelongan yang baru dan satu harga rizab baru. Maka, pada 8 Jun 1998, Pentadbir Tanah telah sekali lagi mengeluarkan Borang 16H yang memerintahkan supaya tanah tersebut dijual melalui perlelongan awam, dan dijual pada harga rizab baru ('perintah kedua'). Perayu telah merayu terhadap perintah kedua tersebut. Di hadapan Mahkamah Rayuan perayu berhujah bahawa perintah kedua adalah tidak sempurna atas autoriti *Eu Finance v. Lim Yoke Foo* dan *Periwa Affin Babnk Berhad v. Lim Weow,* kerana telah terdapat satu perintah lebih awal yang masih kekal dalam bentuk perintah pertama disini.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Pentadbir Tanah tidak membatalkan perintah pertama sepertimana yang telah dilakukan dalam *Eu Finance*. Dan, tidak seperti apa yang telah dilakukan dalam *Perwira Affin Bank*, Pentadbir Tanah juga tidak bersetuju dengan permintaan perayu untuk membuka semula siasatan dan mengadakan yang baru.

[2] Apa yang dilakukan oleh Pentadbir Tanah ialah menetapkan satu tarikh perlelongan yang baru dan harga rizab baru yang merupakan bidangkuasanya, tetapi, dengan tidak disengajakan, beliau telah melakukan kesilapan dengan memberitahu kedua-dua pihak mengenai perkara yang sedemikian melalui pengeluaran satu lagi Borang 16H, sedangkan sepucuk surat sudah memadai untuk memaklumkan pihak-pihak tersebut mengenai tarikh perlelongan dan harga rizab baru.

[3] Penggunaan borang yang salah tidak menjadikan apa yang telah dilakukan itu benda itu, jika satu penjelasan yang boleh diterima diberikan berhubung dengan keadaan bagaimana borang tersebut telah dikeluarkan. Dalam keadaan ini, Pentadbir Tanah tidak melakukan apa-apa untuk menunjukkan bahawa perintah pertamanya adalah tidak sah. Kesalahan yang dilakukan olehnya, tetapi yang mana tidak menjejaskan kesahihan perintah pertama, ialah mengeluarkan Borang 16H yang kedua bagi memaklumkan pihak-pihak tersebut mengenai tarikh perlelongan dan harga rizab yang baru, sedangkan sepucuk surat sudah memadai.

[3a] Oleh kerana pada realitinya, Pentadbir Tanah tidak pernah membuat satu perintah yang kedua untuk penjualan, perintah kedua tersebut tidak boleh sama sekali, berdasarkan Borang 16H, dianggapkan sebagai perintah kedua untuk penjualan. Hakim yang bijaksana adalah betul dalam memutuskan bahawa tidak dapat dibacakan ke dalam perintah kedua tersebut, sebarang perintah untuk jualan, tetapi bahawa Borang 16H kedua hanya memaklumkan pihak-pihak tersebut mengenai tarikh perlelongan dan harga rizab yang baru.

[Rayuan ditolak.]

Case(s) referred to:
Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 ***(dist)***
Lim Yoke Foo v. Eu Finance Bhd [1985] 1 MLJ 17 ***(refd)***
Perwira Affin Bank Bhd v. Lim Weow [1983] 3 MLJ 56 ***(dist)***

Legislation referred to:
National Land Code 1965, ss. 341, 263(1), 418

For the appellant - N Shanmugam; M/s Shan & Gooi
For the respondent - YM Yoong (WM Lee with her); M/s Shook Lin & Bok

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-73-1998]

Reported by WA Sharif

JUDGMENT

Siti Norma Yaakob JCA:

The proceedings in this appeal were first commenced in the Land Office at Penang. The Land Administrator had, pursuant to an application for the sale of two plots of land charged by the appellant to the respondent, held an enquiry and on 6 October 1997, granted an order for sale under s. 263 of the National Land Code ("the Code") by the issue of Form 16H ("the first order"). Previous to this and between 1982 and 1983, the respondent had granted banking facilities totalling RM40 million to the appellant and those facilities were in part secured by the charge of the two plots of land, the subject matter in the first order.

In the first order, the date for the public auction of the lands was fixed for 11 November 1987, at 10am but the auction did not take place as the parties entered into negotiations for settlement. No settlement was reached however and the respondent applied to the Land Administrator to schedule a new auction date and to fix a new reserve price.

The Land Administrator, called all parties to meet him at his office on 30 May 1997. It was at this meeting that the appellant sought to set aside the first order by applying to re-open the enquiry under s. 34 of the Code. The Land Administrator heard arguments and submissions from both sides and adjourned the matter for decision.

On 19 February 1998, the Land Administrator rejected the appellant's request to re-open the enquiry and allowed the respondent's application for a new auction date and a new reserve price. However he was not able to fix the auction date and reserve price on that date as he needed particulars of the land valuations from both parties. The Land Administrator adjourned the matter to enable both parties to submit valuation reports of the lands to him. No appeal under s. 418 of the Code was lodged by the appellant against the dismissal of their application to re-open the enquiry.

The respondent submitted a valuation report to the Land Administrator but not the appellant and following this, the Land Administrator issued another Form 16H dated 8 June 1998 ("the second order") ordering:

(1) the lands to be sold,

(2) the lands to be auctioned on 15 July 1998 and

(3) the reserve price at RM16.5 million.

The second order was served on all parties and the appellant responded by sending out a letter dated 23 June 1998, to the Land Administrator stating that the public auction cannot take place as the Court of Appeal had in the meantime set aside an order for sale in respect of lands charged together with the same two plots by the appellant to the respondent.

In Civil Appeal W-02-302-96, the Court of Appeal was dealing with the other lands charged by the appellant to the respondent as security for the same banking facilities. This fact is not disputed and as such the Court of Appeal's decision is not binding on the order for sale made by the Land Administrator, which dealt with different plots of land.

On 10 July 1998, the appellant filed an appeal against the second order by way of originating motion seeking to have the second order set aside on the grounds:

(1) that it is defective for non-compliance with the Code.

(2) that the amount due had been wrongly computed and

(3) that there is a binding Court of Appeal decision setting aside the order for sale. We have already dealt with this ground and we say it is a non-issue.

Before us the appellant raised two issues. The first is that they were not given the opportunity to argue on the reserve price. This is not correct as on 19 February 1998, when the Land Administrator dismissed the appellant's request to re-open the enquiry, he had adjourned the hearing to await the valuation reports from both parties so that he would be in a better position to fix the reserve price. Learned counsel on both sides were present when that directive was given. The respondent submitted their valuation report to the Land Administrator but not the appellant. The appellant had from the date when the valuation report was called for on 19 February 1998, until 8 June 1998, when the second order was issued, a good three and a half months to do so but failed to submit any valuation report whilst the respondent acted promptly by delivering one on 21 April

1998. As such the appellant cannot complain for loss of opportunity to argue on the reserve price as such loss was occasioned by their own neglect or default.

The appellant's second objection was that the second order was defective in that there was already a subsisting earlier order in the form of the first order and for this objection relied on the authorities of (1) *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 which was affirmed by the Privy Council in (2) *Lim Yoke Foo v. Eu Finance Berhad* [1985] 1 MLJ 17 and (3) *Perwira Affin Bank Bhd v. Lim Weow* [1983] 3 MLJ 56. Those authorities held that once an order for sale is made by the Land Administrator under s. 263 of the Code, he becomes *functus officio* and he cannot make a subsequent order for sale under s. 263. Any second order for sale is a nullity and is devoid or any effect.

The case of *Eu Finance (supra)* is distinguishable as in the first order for sale made by the collector of Land Revenue there was an error in the number of lands sought to be sold. Only 12 out of 20 titles were identified. The collector acknowledged the error and purported to cancel the sale. Subsequently another collector purported to make and issue another order of sale, specifying the amount due to the appellant as the same as that stated in the first order but fixing a higher reserve price and scheduling all 20 titles. Abdoolcader J (as he then was), had this to say on the status and validity of the second order for sale.

> There is no power in the Collector to cancel an order under section 263 or the sale to be effected thereby. When the Collector purported to cancel the first order on the respondent lodging an appeal against it, he was in effect postponing the sale, as he has only the power by virtue of the provisions of section 264(3) to postpone a sale ordered under section 263 and subject thereto, an order of sale once made will be implemented in accordance with the provisions of section 265 ...

On appeal, the Federal Court confirmed that the collector had no powers under the Code to cancel his own order for sale made under s. 263(1). As such the earlier order remained on foot and the second order was "no order at all within and for the purposes of section 263 and is a nullity and devoid of any effect". This reasoning was approved by the Privy Council which also found that "an essential prerequisite of an order for sale under s. 263 is that there shall have been an application by the chargee for such an order in Form 16G. The 1979 order was preceded by no such application. Another essential is that the collector shall hold an enquiry pursuant to s. 261. The 1979 order was preceded by no such enquiry. Only at the conclusion of such an enquiry has the collector jurisdiction under s. 263 to order a sale. It inevitably follows that the collector had no right, as

between the lender and the borrower, to make the 1979 order. His duty, and his only jurisdiction, was to make the appropriate arrangements for the auction sale directed by the 1976 order but postponed. The 1979 order was hopelessly bad as between the lender and the borrower." The 1979 order referred to in the report is the second order whilst the 1976 order is the first order.

In *Perwira Affin Bank's* case *(supra)* we had the occasion to decide on a similar issue. The facts disclosed that the bank applied for an order for sale from the Land Administrator, Kuala Lumpur, who held an enquiry and made an order for sale on 2 June 1981 ("the first order"). The auction was called off due to irregularities in the enquiry. The Land Administrator then commenced a fresh enquiry, made a new order for sale and fixed a new auction date ("the second order"). Subsequently the respondent received a notice from the Land Administrator informing her that a new enquiry date had been fixed. The respondent applied to preclude the bank from proceeding with the sale on the ground that the second order was a nullity and that the bank's claim to proceed with the sale under the first order was barred by limitation. The trial judge found that after the 2 June 1982, the Land Administrator was *functus officio* and the second order was invalid and the only valid order for sale was the first order, a finding that this court confirmed to have been correctly made.

In the instant appeal before us, can it be said that the second order rank similar in status to the second orders made by the collector in *Eu Finance's* case and the Land Administrator in *Perwira Affin Bank's* case? We reply in the negative as the circumstances leading to the second order stand on their own. Firstly the Land Administrator did not cancel the first order as was done by his predecessor in *Eu Finance.* Secondly unlike what was done in *Perwira Affin Bank,* the Land Administrator did not accede to the appellant's request to re-open the enquiry and hold a fresh one. All that he did was to fix a new auction date and a new reserve price, matters that were well within his powers and jurisdiction, but unwittingly, he committed the error of notifying both parties of such matters through the issue of another Form 16H, the statutory form issued under s. 263 of the Code and which is headed "PERINTAH JUALAN ATAS PERMINTAAN PEMEGANG GADAIAN". Since in reality, he never made a second order for sale, nor cancelled the earlier one made through his first order, we say that the second order, can never, on the face of Form 16H, be regarded as a second order for sale. As pointed out by the trial judge, the Land Office was not equipped with an appropriate form wherein directions for sale, can be notified to the parties. In this instance a letter would have sufficed to inform the parties of the new auction date and new reserve

price. This was not done but instead the Land Administrator used Form 16H without deleting the offending words "Dengan ini, pada menjalankan kuasa yang diberi oleh s. 263 Kanun Tanah Negara, perintah supaya dijual tanah yang tersebut itu ...", although he took pains to delete other words which he considered to be inappropriate.

Be that as it may, the use or a wrong form does not make it to be what it is, if an acceptable explanation is given as to the circumstances how the form was issued in the first place. In this instance, the Land Administrator did nothing to indicate that his first order was in any way invalid. What he did wrong and which we say did not affect the validity of the first order, was to issue a second Form 16H, when a letter would suffice to inform both parties of the new date of auction and the reserve price. The need to notify the parties of these matters became necessary as on 19 December 1998, when they were before him, the Land Administrator did not have particulars of the land valuations. If such particulars were available then, the Land Administrator would, in their very presence, inform both parties of the auction date and reserve price and he would not have made the error of issuing the second Form 16H.

On the facts of this appeal, we were in complete agreement with the findings of the learned trial judge that there cannot be read into the second order, any order for sale but that the second Form 16H merely informed the parties of the new auction date and reserve price. It could not have contained any other particulars as the Land Administrator did nothing more then to fix an auction date and a reserve price. Based on our findings, we had accordingly dismissed this appeal with costs and we ordered the deposit to be paid out to the respondent to account of their taxed costs.